OSCAM SPA

v.

OVERSEAS UNION BANK (MALAYSIA) BHD & ANOR; LIM KENG SIEW & ANOR (THIRD PARTIES)

HIGH COURT MALAYA, KUALA LUMPUR
MOHD GHAZALI J
[SUIT NO: D1-22-104-97]
10 MARCH 1999

CIVIL PROCEDURE: *Parties - Joinder of parties - Addition of a defendant - Test to be applied - Whether rights or liability of a party will be affected by any order made - Rules of the High Court 1980, O. 15 r. 6(2) - Multiplicity of proceedings and costs - Service out of the jurisdiction*

This was the plaintiff's appeal against the decision of the senior assistant registrar allowing the 2nd defendant's application to be added as a defendant in the plaintiff's suit against the 1st defendant.

The plaintiff, a foreign company, had contracted to sell some machinery to the 2nd defendant. Part of the purchase price was paid and the balance was secured by a payment guarantee issued by the 1st defendant bank in favour of the plaintiff ('the payment guarantee'). The 1st defendant's liability under the payment guarantee was conditional upon the 2nd defendant receiving an acceptable bank guarantee to secure the due performance of the machinery ('the performance guarantee').

After the machinery was shipped, the 1st defendant refused to make payment under the payment guarantee as a result of which the plaintiff filed the present suit against the 1st defendant.

Subsequently, the 2nd defendant filed an application to be added as a defendant to the suit. It claimed that in breach of the contract, the plaintiff had unduly delayed the installation and/or commissioning of the machinery. That the machinery supplied was defective from the date it was commissioned as a result of which the 2nd defendant suffered substantial loss and damage. Moreover, the 2nd defendant claimed that the performance guarantee provided to it was not acceptable. Therefore, the 2nd defendant contended that the 1st defendant's liability under the payment guarantee had not arisen.

The issue before the court was whether the 2nd defendant should be permitted to intervene in the suit filed by the plaintiff against the 1st defendant.

Held:

[1] The object of O. 15 r. 6(2) of the Rules of the High Court 1980 is to prevent a multiplicity of proceedings, and the court has a wide discretion to make an order so that all matters in dispute can be effectually and completely determined and adjudicated upon.

[2] The test to be applied was: would the 2nd defendant's rights against or liability to any party to the suit in respect of the subject of the suit be directly affected by any order which might be made in the suit?

[3] The plaintiff's suit against the 1st defendant arose out of a contract of sale between the plaintiff and the 2nd defendant. The 1st defendant had refused to pay the plaintiff the balance of the purchase price, and at the end of the day, if it was ordered to do so, it would ultimately be the 2nd defendant who would be affected as the payment guarantee was issued at the request of the 2nd defendant.

[4] The plaintiff, a foreign entity, had submitted to the jurisdiction of the court by filling this suit against the 1st defendant. If the 2nd defendant wished to proceed against the plaintiff by way of a separate action in the courts here, it would need leave for service out of the jurisdiction as the solicitors for the plaintiff in this suit had no instructions to accept service of legal process in Malaysia on the plaintiff's behalf.

[5] Allowing the 2nd defendant to be added as a defendant to this suit would certainly prevent a multiplicity of proceedings and would enable the court to determine the disputes between all parties. It would also save costs and unnecessary expenses for all parties. The 2nd defendant was clearly interested in the dispute between the plaintiff and the 1st defendant, which had arisen out of the contract of sale between the plaintiff and the 2nd defendant.

[Appeal dismissed with costs.]

Case(s) referred to:

Arab Malaysian Merchant Bank Bhd v. Dr Jamaludin Dato' Mohd Jarjis [1991] 2 CLJ 862 ***(refd)***

Pegang Mining Co Ltd v. Choong Sam & Ors [1969] 2 MLJ 52 ***(refd)***

Tajjul Ariffin Mustapha v. Heng Cheng Hong [1993] 3 CLJ 117 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 14, O. 15 r. 6(2)(b), (c)

For the plaintiff - Rabindra S Nathan (Felix Raj with him); M/s Shearn Delamore & Co

For the 2nd defendant - Mubashir Mansor (KS Kwan with him); M/s Skrine & Co

Reported by Ling Hea Hoon

JUDGMENT

Mohd Ghazali J:

The plaintiff, a limited company incorporated in Italy, based upon a payment guarantee, filed this action against the first defendant, a licenced bank carrying on business in Malaysia.

The Background

By a contract evidenced in part by an order confirmation dated 12 January 1996 and a Proforma Invoice No. 05/96 dated 20 February 1996 the plaintiff contracted to sell to Premier Steel Service Sdn Bhd ("Premier"), ie, the second defendant, certain machinery and equipment ("the machinery") for a total price of Italian Lira 1,405,000,000. Prior to the delivery of the machinery, Premier had effected payment in respect of 70% of the total purchase price.

The balance, ie, 30% of the purchase price, was secured by a payment guarantee dated 14 June 1996 issued by the first defendant whereby it engaged itself to pay to the plaintiff 20% of the purchase price five (5) months after the bill of lading and another 10% eight (8) months after the bill of lading. The first defendant's liability to make payment under its payment guarantee was expressly made conditional upon the receipt by Premier of an acceptable bank guarantee issued in favour of Premier to guarantee the due performance of the machinery. The payment guarantee issued by the first defendant to the plaintiff, *inter alia*, read –

PAYMENT GUARANTEE

> In consideration of your agreeing to ship machineries as per Proforma Invoice No. 05/96 dated 20th February 1996 to Premier Steel Service Sdn Bhd ... for which payment of 70% of purchase price ... has been made ... we engage ourselves to pay you 20% of purchase price ... five (5) months after the date of Bill of Lading pursuant to the above Letter of Credit and 10% of purchase price ... eight (8) months after the date of such Bill of Lading for the abovesaid machineries notwithstanding any dispute or protest or opposition from Premier Steel Service Sdn Bhd.
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> This payment guarantee is valid until 31st March 1997 and payment hereunder must be made by then. Once full payment has been released under this guarantee the guarantee will be null and void even in the case that it will not be returned to us.
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> Our liability to pay hereunder is conditional upon Premier Steel Service Sdn Bhd's receipt of an acceptable bank guarantee issued in favour of Premier Steel Service Sdn Bhd to guarantee the due performance of your machineries.

The machinery was shipped on 26 June 1996 and the first defendant was therefore liable, according to the plaintiff, to pay them the sum of Italian Lira 284,740,000 five (5) months thereafter, ie, by 26 November 1996 and the remaining Italian Lira 142,370,000 by 26 February 1997. Despite demands the first defendant has refused and failed to pay the sum of Italian Lira 284,70,000 which was due and payable as a result of which, this action.

The writ and statement of claim was filed on 13 February 1997 and the first defendant, the only defendant then, entered appearance on 10 March 1997. On 13 March 1997 the plaintiff filed an application for leave to be granted to enter summary judgment against the first defendant pursuant to O. 14 of the Rules of the High Court 1980. On 24 March 1997 the first defendant applied for leave to issue a third party notice against the above-named third parties. The third parties entered appearance on 26 March 1997.

Application By Premier To Be Added As A Defendant

On 28 March 1997 Premier filed an application to be added as a defendant to the suit. In its affidavit in support, Premier claimed, *inter alia*, that the machinery was delivered to their factory on or about 8 August 1996 and that in breach of contract, the plaintiff has unduly delayed in the installation and/or commissioning of the machinery with the consequence that the machinery was not finally commissioned until 14 October 1996. In further breach of contract, the machinery supplied was defective and was not functioning properly or smoothly right from the date it was commissioned as a result of which they suffered substantial losses and damages. In the midst of all the problems encountered by them with the machinery, Malayan Banking Berhad ("MBB") had on or about 7 December 1996 purported to forward to them a bank guarantee to guarantee the due performance of the machinery wherein MBB's liability to make payment was limited to 10% of the total purchase price. This bank guarantee was issued to Premier pursuant to a term found in the Order Confirmation under a subheading entitled "Warranty" and which read:

> A bank guarantee in your favour will be issued for the period of 12 months from commissioning or latest 14 months from B/L. In the event all machineries have arrived and OSCAM is unable to install/commission the machineries due to no fault of theirs, the guarantee period shall then be limited to 14 months from the date of the B/L. The amount specified of this bank guarantee will be 10% of the total amount.

Premier insisted that the said bank guarantee issued by MBB to them is not acceptable on various grounds and due notification thereof has been made by them to the first defendant. In the circumstances, it is their stand that the first defendant's liability to pay the plaintiff under its payment guarantee had not

arisen and the plaintiff's claim is devoid of any merits or basis. It is also their stand that the plaintiff had been fraudulent in its dealings and that their call on the first defendant pursuant to the payment guarantee was fraudulent.

In the premises, it is the contention of Premier that various issues have arisen between them and the plaintiff, namely –

(i) as to the plaintiff's breach of its contract with them;

(ii) as to whether MBB's bank guarantee is acceptable to them; and

(iii) as to whether the plaintiff's call on the first defendant's payment guarantee was fraudulent in all the circumstances of the case which would, in turn, determine the first defendant's liability to the plaintiff in this action.

Premier insist that all the aforesaid issues and questions between them and the plaintiff are so related and connected with the plaintiff's claim against the first defendant in this action that it would be just and convenient for those issues and questions to be determined in this action. Further, any order made by the court in this action would affect Premier directly or indirectly as they shall be ultimately liable to satisfy any judgment against the first defendant in this action, directly or indirectly as the first defendant's guarantee was given on their behalf.

The Decision Of The Senior Assistant Registrar

The learned senior assistant registrar allowed Premier's application to be added as a defendant and against this decision the plaintiff appealed.

The Appeal

It is the stand of the plaintiff that Premier should not intervene as the matter is between them (ie, the plaintiff) and the first defendant and there is no cause of action against Premier. They contended that the first defendant has failed to fulfill its obligations under the payment guarantee by refusing to honour payment concerning the remaining 30% due and owing and hence they commenced this action to recover that 30% owing under the payment guarantee only and that it was not necessary for them to sue Premier. The first defendant's payment guarantee stands alone and is independent of the sale contract.

The only issue in this appeal is whether Premier should be permitted to intervene in the action filed by the plaintiff against the first defendant. Order 15 r. 6(2)(b) provides that at any stage of the proceedings in any cause or matter, the court may on such terms as it thinks just and either on its own motion or on application order any of the following persons to be added as a party, namely:

(i) any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon; or

(ii) Any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.

In the instant case, what is clear is that the plaintiff's claim against the first defendant is pursuant to the payment guarantee. What is clearly stated in the payment guarantee is that the first defendant's liability to pay thereunder is conditional upon Premier's receipt of an acceptable bank guarantee issued in favour of Premier to guarantee the due performance of the plaintiff's machinery. Premier has informed the first defendant that they did not receive "an acceptable bank guarantee" to guarantee the due performance of the plaintiff's machinery.

In their affidavit in support of the application, Premier stressed that the first defendant's liability was expressly made conditional upon the receipt by Premier of an acceptable bank guarantee issued in their favour to guarantee the due performance of the machinery. Premier also stressed that it was an express term of the contract between the plaintiff and them that the plaintiff will cause to be issued to them a bank guarantee guaranteeing the due performance of the machinery for a period of 12 months after the date of the commissioning. In breach of contract, the plaintiff has unduly delayed in the installation and/or commissioning of the machinery with the consequence that the machinery was not finally commissioned until 14 October 1996. In further breach of contract, the machinery supplied by the plaintiff was defective and was not functioning properly or smoothly right from the date it was commissioned as a consequence of which Premier had suffered substantial loss and damages. The various problems with and defects in respect of the machinery were not fully rectified until January 1997 after the plaintiff had sent for its engineer to work on the machinery. In the midst of it all, MBB had on 7 December 1996 purported to forward a bank guarantee to Premier to guarantee the due performance of the machinery wherein MBB's liability to make payment was limited to 10% of the total purchase price. The said bank guarantee by MBB is not acceptable to Premier on various grounds and due notification thereof has been given by them. In the circumstance, Premier insisted that the first defendant's liability to pay the plaintiff under its payment guarantee has not arisen and the plaintiff's claim therefore is devoid of any merit or basis. It is also Premier's stand that the plaintiff had been fraudulent in its dealings with them and that the plaintiff's call on the first defendant pursuant to the payment guarantee was fraudulent.

Premier's then insisted that any order made by the court in this action would affect them directly or indirectly as they shall be ultimately liable to satisfy any judgment against the first defendant directly or indirectly as the first defendant's payment guarantee was given on their behalf. It is also their stand that they have a legal interest which is related to and connected with the subject matter of this action. Furthermore they believe that the plaintiff is desirous of suing them presumably for the balance 30% of the purchase price as can be seen from the following letter from a legal firm, namely, Messrs Shearn Delamore & Co to their solicitors which reads:

Oscam and Premier Steel

> We have been requested by Studio Avvocato Tosetto to serve on Premier Steel Service Sdn Bhd, a Summons issued by the Court of Turin [Tribunale Di Torino]. Whilst we are in a position to effect service on your client's registered address, we write to enquire whether you are instructed to accept service on their behalf.

Prior to the above letter, Premier had through its solicitors asked Messrs Shearn Delamore & Co whether the latter had instructions to accept service of legal process in Malaysia on behalf of the plaintiff to which they have replied in the negative. Premier is of the view that this refusal to accept service of process in Malaysia in unreasonable and in bad faith as the plaintiff had already submitted to the jurisdiction of the court by commencing this action against the first defendant. Subsequently Premier was served with proceedings commenced by the plaintiff in the Court of Turin. Premier had already instructed solicitors in Italy to obtain a stay of proceedings pending the outcome of this application.

Premier stressed that as the issues and questions which have arisen between their goodselves and the plaintiff are related to and connected with the plaintiff's claim in this action, it would be just and convenient and would prevent a multiciplicity of proceedings if the plaintiff were to claim against Premier in this action. There would then be no necessity for the plaintiff to commence proceedings against Premier in Italy and the plaintiff need not be involved in a multiplicity of proceedings. Furthermore it is the intention of Premier, if this application is allowed, to counterclaim against the plaintiff for substantial damages for fraud and/or breach of contract in a sum which would far exceed the 30% balance of the purchase price claimed by the plaintiff in this action.

From my reading of the payment guarantee, I would think that, on the surface of it, notwithstanding that the machinery was defective as claimed by Premier, that would not relieve the first defendant from its obligations under the payment guarantee since the latter had engaged themselves therein to pay the

30% balance of the purchase price "notwithstanding any dispute or protest or opposition from Premier". But then, the payment guarantee also contained a condition, namely, that the first defendant's liability to pay thereunder is conditional upon Premier's receipt of an acceptable bank guarantee issued in their favour to guarantee the due performance of the machinery. In their application to be added as a defendant, Premier claimed that the bank guarantee issued by MBB and forwarded to them is not acceptable on various grounds and they have accordingly informed the first defendant which in turn, to me, is now faced with the dilemma of making the payment due under the payment guarantee in favour of the plaintiff.

The main object of O. 15 r. 6(2) of the Rules of the High Court is to prevent a multiciplicity of proceedings and the court has wide discretion to make an order so that all matters in dispute can be effectually and completely determined and adjudicated upon. In *Tajjul Ariffin bin Mustapha v. Heng Cheng Hong* [1993] 2 MLJ 143 at p. 151, Edgar Joseph Jr SCJ in distilling the general principles in relation to O. 15 r. 6(2) said that a person who is not a party may be added as a defendant over the objections of the plaintiff on his own intervention. In the instant case the plaintiff, in opposing Premier's application to be added as a defendant, has argued, *inter alia,* that:

(i) the proper defendant is only the first defendant and not Premier as the latter is not the party which issued the payment guarantee;

(ii) Premier's complaints concerning the defective machinery, the delay in installing and commissioning the machinery and the alleged fraudulent call on the payment guarantee are not matters relevant to the present proceedings between the plaintiff and the first defendant – these are matters which should be raised, if at all, by way of a separate action by Premier against the plaintiff;

(iii) the claims made by Premier against the plaintiff has no connection with the plaintiff's claim against the first defendant – the payment guarantee stands alone and accordingly the plaintiff is entitled to sue the first defendant alone without involving Premier; and

(iv) the matters raised by Premier are matters not connected to the present proceedings between the plaintiff and the first defendant as the cause of action only concerns the recovery of a debt from the first defendant.

Order 15 r. 6(2)(c) provides the application must be supported by an affidavit showing that person's interest in the matters in dispute in the cause or matter or, as the case may be, the question or issue to be determined as between him and any party to the cause or matter. What is the test? In *Pegang Mining Co Ltd v. Choong Sam & Ors* [1969] 2 MLJ 52, Lord Diplock said (at p. 55):

> The cases illustrate the great variety of circumstances in which it may be sought to join an additional party to an existing action. In their Lordships' view one of the principal objects of the rule is to enable the court to prevent injustice being done to a person whose rights will be affected by its judgment by proceeding to adjudicate upon the matter in dispute in the action without his being given an opportunity of being heard. To achieve this object calls for a flexibility of approach which makes it undesirable in the present case, in which the facts are unique, to attempt to lay down any general proposition which could be applicable to all cases.
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> It has been sometimes said as in *Moser v. Marsden* and in *In re I.G Farbenindustrie A.G.* that a party may be added if his legal interests will be affected by the judgment in the action but not if his commercial interests only would be affected. While their Lordships agree that the mere fact that a person is likely to be better off financially if a case is decided one way rather than another is not a sufficient ground to entitle him to be added as a party, they do not find the dichotomy between "legal" and "commercial" interests helpful. A better way of expressing the test is: will his rights against or liabilities to any party to the action in respect of the subject matter of the action be directly affected by any order which may be made in the action?

Will Premier's rights against or liability to any party to the action in respect of the subject of the action be directly affected by any order which may be made in this action? Counsel for Premier has submitted that the test has been clarified further in *Arab Malaysian Merchant Bank Bhd v. Jamaludin bin Dato Mohd Jarjis* [1991] 1 MLJ 27 at p. 28 where Gunn Chit Tuan SCJ (as he then was) said:

> One of the class of cases covered by the said rule, which allows intervention by persons not parties, is where the proprietary or pecuniary rights of the intervener are directly affected by the proceedings or where the intervener may be rendered liable to satisfy any judgment directly or indirectly. The ambit of this class has been materially widened by the decision of the UK Court of Appeal in *Gurtner v. Circuit*, the effect of which is to include any case in which the intervener is directly affected not only in his legal rights but in his pocket. In this connection, we would refer to and respectfully adopt the following dictum of Lord Denning MR, in that case, in which his Lordship said as follows:
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> > It seems to me that, when two parties are in dispute in an action at law and the determination of that dispute will directly affect a third person in his legal rights or in his pocket, in that he will be bound to foot the bill, then the court in its discretion may allow him to be added as a party on such terms as it thinks fit. By so doing, the court achieves the object of the rule. It enables all matters in dispute to be effectually and completely, determined and adjudicated upon between all those directly concerned in the outcome.

The plaintiff has argued that their claim against the first defendant will be tried on issues and evidence that are different from Premier's alleged claim against the plaintiff, ie, the two claims are mutually exclusive of each other. I do not agree. What is clear is that the plaintiff's suit against the first defendant arose out of a contract of sale between the plaintiff and Premier. The first defendant has failed to pay the plaintiff the balance of the 30% of the sale price and at the end of the day if it is ordered to do so, it will ultimately be Premier who will be out of pocket as the payment guarantee was issued at the request of Premier. Furthermore, the plaintiff, a foreign entity, has submitted to the jurisdiction of the court by filling this action against the first defendant. If at all Premier would wish to proceed against the plaintiff by way of a separate action in the courts here, they would need leave for service out of the jurisdiction as solicitors for the plaintiff in this action has informed that they have no instructions to accept service of legal process in Malaysia on the plaintiff's behalf. In *Tajjul Ariffin bin Mustapha v. Heng Cheng Hong*, referred to earlier, the learned SCJ said (at p. 153):

> ..., the objects of para 2(b) as to joinder of parties are generally speaking the same as the objects of the rules governing third party proceedings, that is to say: (1) to prevent multiplicity of proceedings and to enable the court to determine disputes between all parties to them in one action; and (2) to prevent the same or substantially the same questions or issues being tried all over again with possibly different results. (See *Supreme Court Practice* (1991) para 15/6/7 at p. 193).

The learned senior assistant registrar has allowed Premier's application to be added as a defendant and I cannot find anything erroneous with her decision. Allowing Premier to be added as a defendant to this suit would certainly prevent a multiplicity of proceedings and would enable the court to determine disputes between all parties. It would also incidentally save costs and unnecessary expenses for all parties. Premier is clearly interested in the dispute between the plaintiff and the first defendant which has arisen out of the contract of sale between the plaintiff and their goodselves. In the premises, this appeal must be dismissed with costs.